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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1087.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL., PETITIONERS,

VS.

DONNELLY GARMENT COMPANY, A CORPORATION; DONNELLY GARMENT SALES COMPANY, A CORPORATION; DONNELLY GARMENT WORKERS' UNION ET AL., AND CENTRAL SURETY AND INSURANCE COMPANY, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion in the District Court (R. 542-567) is reported at 55 F. Supp. 572. The opinion in the Circuit Court of Appeals (R. 575-593) is reported at 147 F. 2d 246.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 19, 1945 (R. 593). The petition for certiorari was filed March 28, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether three injunction bonds—two conditioned under Section 18 of the Clayton Act and the third under Equity Rule 74, in strict compliance with judicial orders prescribing their terms—are to be construed as written, or are to be construed by incorporating therein the additional and differing provisions of Section 7 of the Norris-LaGuardia Act.

2. Whether the bonds are to be ignored altogether and the liability of respondents determined according to Section 7 alone.

STATUTES AND EQUITY RULE INVOLVED.

Section 18 of the Clayton Act (Act of October 15, 1914, 38 Stat. 738, 28 U. S. C., Sec. 382), under which two of the bonds were given, provides as follows:

> "Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby."

Equity Rule 74, under which the third bond was given, provided as follows:

> "*Injunction pending appeal.* When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

Section 7 of the Norris-LaGuardia Act (Act of March 23, 1932, 47 Stat. 70, 29 U. S. C., Sec. 101, *et seq.*), under which none of the bonds was given, provides, in part, as follows:

> "* * * No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.
>
> "The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But noth-

ing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

STATEMENT.

The opinion of the Circuit Court of Appeals contains a concise statement of the case containing all that is material to the consideration of the questions presented here (R. 576-581, 584-6; 147 F. 2d 248-250, 251-2). That statement is not challenged by petitioners. We therefore substantially adopt it, as follows (referring to the parties as they were designated in the District Court):

This action began with a motion of the defendants in the case of *Donnelly Garment Company et al.* v. *International Ladies' Garment Workers' Union et al.* for a hearing to assess damages and expenses caused defendants by the alleged erroneous issue and continuance of certain injunctive orders issued by the district court in the case mentioned, and for a decree against the plaintiffs, the intervener, and the surety on their injunction bonds for the amount of defendants' damages and expenses determined by the court (R. 5). Under the order of the district court made upon the motion (R. 7), the defendants filed a bill of complaint setting forth their claims (R. 8-15); the plaintiffs, the intervener and the surety answered (R. 20-30); and the matter was heard on evidence before the district court, which awarded judgment in favor of defendants in the sum of $2,000 (R. 44-5). The defendants appealed (R. 45).

In order to understand the issues arising on the appeal, it is necessary briefly to state the history of the litigation in which the restraining orders and injunctions were issued. On July 5, 1937 the Donnelly Gar-

ment Company, a corporation engaged in the manufacture of women's garments in Kansas City, Missouri, and the Donnelly Garment Sales Company, a subsidiary handling the sales of the garment company's products, brought an action in the United States District Court for the Western District of Missouri to enjoin the International Ladies' Garment Workers' Union, its officers and agents, and a number of its employees from picketing, boycotting, and through violence and fraud interfering with plaintiffs' business, employees, and customers, in the furtherance of a conspiracy in violation of the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 1 *et seq.* Among the individual defendants were residents of Missouri and of other states. The jurisdiction of the Federal court was grounded exclusively upon the Sherman Act (Dft. Ex. 152, p. 15, R. 78).

On the filing of the complaint the district court issued a temporary restraining order, returnable in five days (R. 182). The court required and the plaintiffs and the surety gave a bond on the restraining order in the sum of $2,000, conditioned to pay defendants "such costs and damages as may be incurred or suffered by reason of the wrongful issuance of said restraining order or injunction should it be thereafter dissolved or it be decided that said temporary restraining order was wrongfully obtained." (R. 186-7).

On the return day the defendants moved to dismiss the bill and vacate the restraining order. The ground for this motion was that the controversy alleged in the bill involved a labor dispute within the meaning of the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 101 *et seq.*, and that, by virtue of that Act, a Federal court was without jurisdiction to issue a restraining order or a temporary or permanent injunction on the allegations of the complaint (R. 188-191). On August 13, 1937 defendants'

motion was denied, the district court saying in its opinion (20 F. Supp. 767, 768) that the defendants, conceding that the court formerly had jurisdiction of the action set out in the complaint, contended that its jurisdiction had been taken away by the Norris-LaGuardia Act. The temporary restraining order was by the court continued in effect with the consent of the parties until the ruling on plaintiffs' application for a temporary injunction. (R. 191-2).

After these proceedings the Donnelly Garment Workers' Union, an organization of the plaintiffs' employees, was permitted to intervene in the case (Dft. 141, p. 42), alleging that it included in its membership all of the employees of the Donnelly Garment Company, by which it had been recognized as the agency for collective bargaining between the company and its employees, and that contracts between it and the plaintiff company concerning rates of pay and hours and conditions of work had been made. The intervener joined in the prayer of the bill of complaint for an injunction restraining the defendants from the acts charged in the complaint, and further asked that the plaintiffs be enjoined from abrogating their contracts with the intervener and from attempting to coerce or compel the members of the intervener organization to join the International Union. The intervener denied that a labor dispute was involved in the controversy set forth in the original bill, asserted that neither the Norris-LaGuardia Act nor the National Labor Relations Act (29 U. S. C. A., Sec. 151 *et seq.*) was applicable on the issues involved, and alleged the unconstitutionality of both Acts if interpreted to apply in the situation before the court. (Dft. 141, pp. 43-55, R. 68).

Because of the allegations in the intervening petition concerning the unconstitutionality of the Norris-

LaGuardia Act and the National Labor Relations Act, defendants conceived the idea that an injunction was sought against the operation of an Act of Congress within the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. A., Sec. 380a (Dft. Ex. 141, p. 70; R. 193). Accordingly, on their suggestion, a three-judge court was empaneled (Dft. Ex. 141, pp. 70-72; R. 194-6), and plaintiffs' application for a temporary injunction and defendants' motion to dismiss came on for hearing before that court (Dft. Ex. 141, p. 88). The issue was the same as that presented to the district court on the temporary restraining order, the court stating in its opinion (21 F. Supp. 807, 809) that the only ground of defense relied upon by defendants was the contention that the Norris-LaGuardia Act applied and deprived the district court of jurisdiction. This contention the court overruled (21 F. Supp. 807; Dft. Ex. 142, p. 903). The temporary injunction was granted effective December 31, 1937 (Dft. Ex. 141, p. 108; R. 197). The court required and the plaintiffs intervener and surety gave a bond in the sum of $10,000, conditioned to pay all "such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by said temporary injunction if it be finally held that said temporary injunction was improvidently granted" (R. 200, 203).

From the above order defendants took a direct appeal to this Court (Dft. Ex. 141, pp. 112, 116; R. 205), which held that the case was not one for a three-judge court within the Act of August 24, 1937; and, by its order of May 16, 1938, dismissed the appeal at the cost of the defendants, vacated the temporary injunction, and remanded the case for further proceedings in the district court. (304 U. S. 243, 251; R. 205-6).

Plaintiffs amended their bill, and intervener amended its petition, by alleging facts which, in their belief, sustained the jurisdiction of the district court in the event it should be determined that the controversy involved a labor dispute as defined by the Norris-LaGuardia Act, reserving their contention that the Act was not applicable and that no labor dispute was involved (Dft. Ex. 152, pp. 36-38; R. 210). The defendants renewed their motion to dismiss on the same ground as that advanced at previous hearings (R. 210). The district court reached the conclusion that the controversy between the parties involved a labor dispute, and that the plaintiffs' bill failed to allege that plaintiffs had made every reasonable effort to settle the dispute, the Norris-LaGuardia Act requiring such an effort as a condition precedent to the granting of a restraining order, and that for this reason the complaint and intervening petition should be dismissed and the temporary restraining order vacated (23 F. Supp. 998, 1001). On motion of the plaintiffs, the district court on July 18, 1938 resurrected the original restraining order, modified it in certain particulars, and, as modified, continued it in effect pending an appeal, on condition that the plaintiffs execute a bond to defendants in the sum of $25,000 (R. 213-217). This bond was executed by plaintiffs, intervener and surety and, as required and approved by the court, was conditioned as follows (R. 217-218):

> "The condition of the above obligation is such that, whereas, the temporary restraining order heretofore issued in this cause is continued as modified on this 18th day of July 1938, pending appeal of this cause, now, therefore, if the obligors and each of them shall well and truly pay all costs, damages and expenses, including attorneys' fees, suffered by defendants or any of them, by reason of the improvident or erroneous issuance or continuance of said

restraining order, then this bond shall be void, otherwise to remain in full force and effect."

On this appeal the Circuit Court of Appeals reversed. In its opinion (99 F. 2d 314) the court pointed out that at the time this action came on for hearing before the three-judge court, the question whether a labor dispute was involved was a debatable one. It held, however, that the question had been settled by decisions of this Court handed down after the hearing before the three-judge court, and that a labor dispute was involved in the controversy within the meaning of the Norris-LaGuardia Act. It overruled the action of the district court in disposing of the case upon the pleadings, holding that the question whether the plaintiffs failed to use every reasonable effort to settle the labor dispute was a question of fact to be determined from the evidence adduced at a hearing on the merits (99 F. 2d 317). The mandate on reversal was filed in the district court on January 28, 1939 (R. 221).

The case went to trial on its merits and on April 27, 1939 a permanent injunction was granted (Dft. Ex. 152, pp. 129-134). On appeal to the Circuit Court of Appeals the permanent injunction was vacated, the decree of the district court reversed, and the case remanded with directions to dismiss the complaint for want of jurisdiction (119 F. 2d 892). The Circuit Court of Appeals was of the opinion that the findings of the trial court concerning the activities of defendants were sustained by the evidence (p. 898), but that, since there was no proof to show that the enjoined activities of the defendants either in purpose or effect tended to control the interstate market of plaintiffs' product to the detriment of consumers, they were not proscribed by the Sherman Act. *Apex Hosiery Company* v. *Leader et al.*, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044.

On rehearing (121 F. 2d 561) the Circuit Court of Appeals modified its decree and mandate by remanding the case to the district court with permission to the plaintiffs to apply to that court for leave to dismiss as to resident defendants and to amend the complaint to show jurisdiction based upon diversity of citizenship and to state an action under the law of Missouri. This procedure was followed, and on a trial *de novo* on the complaint, as amended, against the nonresident defendants, the district court denied any injunctive relief on grounds not here important (55 F. Supp. 587). Plaintiffs and intervener, however, have appealed from that judgment.

In the instant proceeding the defendants neither alleged nor proved any damage to them as the result of the restraint imposed upon them by any of the orders set out above. Instead, they sought the recovery only of expenses incurred in opposing the various injunctive orders secured by the plaintiffs and intervener. The evidence establishes that all of these expenditures were made by the International Ladies' Garment Workers' Union, the total of all of them amounting to $102,913.57 made up of attorneys' fees, attorneys' disbursements, stenographic fees, photostats, printing, office rent, and miscellaneous items. Since it had been determined that the action in which the injunctive orders were issued involved a labor dispute and that all of the restraining orders and injunctions were erroneously issued because of want of jurisdiction, defendants asserted that plaintiffs were liable to them for the whole amount of their expenses, that the intervener was jointly liable with the plaintiffs to the extent of $97,055.52, and the surety on the various injunction bonds was liable to the extent of $37,000, the total of the penal sums of the three bonds. This result, defendants contended, was compelled by Section 7 of the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 107.

In its findings (R. 37), conclusions of law (R. 44) and opinion (55 F. Supp. 572; R. 543-566), the district court adopted the premise that all of the restraining orders and injunctions were erroneously issued because beyond the jurisdiction of the court which issued them. It also held that the restraining order of July 5, 1937 remained in effect until December 31, 1937, the date when the temporary injunction granted by the three-judge court became effective (*Houghton* v. *Meyer*, 208 U. S. 149); that the temporary injunction granted by the three-judge court remained in effect from December 31, 1937 to May 16, 1938, the date of its vacation by the Supreme Court of the United States. It reached the conclusion that on July 18, 1938, when the district court modified the original restraining order and continued it in effect pending appeal to the circuit court of appeals, the original restraining order, as a matter of law, had long since expired, but by the order of July 18, 1938 was revived and continued in effect from that date until January 28, 1939, when the mandate of the circuit court of appeals on the appeal was filed in the district court. It also concluded that at the time of the defendants' motion on February 7, 1939, to vacate the modified restraining order of July 18, 1938, the restraining order sought to be vacated had long since expired because, by the order of July 18, 1938 it was continued in effect only pending appeal to the circuit court of appeals, and the mandate of that court on the appeal had been filed on January 28, 1939.

The district court denied all of defendants' contentions relative to the construction of Section 7 of the Norris-LaGuardia Act and concerning its application in the case. It held that the liability of the plaintiffs and intervener on each of the restraining orders and injunctions granted in the case must be determined by the conditions expressed in the injunction bonds and limited by the amount of the penalty of the bonds. This holding

resulted in the denial of any recovery by defendants for expenses incurred in resisting the permanent injunction of the district court, on which no bond was required, and also in holding that since there were three separate temporary injunctive orders granted, each in effect for a different period, the defendants were required to establish by the evidence the part of the expenses incurred by them allocable to each injunctive order. The district court found it unnecessary to decide what part of the expenses claimed by the defendants was reasonable. It pointed out, however, that many of the items for which recovery was sought were wholly unnecessary and improvident. (For example, the item of expense incurred as a result of defendants' action in causing a three-judge court to be organized and in appealing to the Supreme Court of the United States from its judgment, and the expense caused by motions to dissolve the temporary orders which were not in effect at the time of the motions.) It was of the opinion on the whole case that in equity each party might properly be required to bear its expenses resulting from the litigation, but it felt compelled, in view of the condition of the $25,000 bond regarding the payment of attorneys' fees and expenses, to allow the defendants their reasonable expense incurred on the motion to vacate the temporary restraining order of July 5, 1937. It denied recovery on either the $2,000 bond on the restraining order of July 5, 1937, or upon the $10,000 bond on the temporary injunction granted by the three-judge court, and found that $2,000 was a reasonable allowance to defendants for expenses and attorneys' fees, recoverable on the bond for $25,000.

On the appeal from this judgment the Circuit Court of Appeals by a unanimous opinion affirmed (R. 575-594). Defendants' petition for certiorari presents two main points, which we discuss in the order presented.

ARGUMENT.

I.

The decision of the court below did not refuse to construe the bonds in the light of the applicable statute, and is not in conflict with the decisions of this Court or of other Circuit Courts of Appeals.

Defendants contend that Section 7 of the Norris-LaGuardia Act was the "applicable statute," and that the District Court and Circuit Court of Appeals erroneously refused to read into the bonds the language of that statute. This contention is completely answered by the opinion of the Circuit Court of Appeals, which said (R. 587-9):

> "Nor may the words of Section 7 of the Norris-LaGuardia Act be read into the bonds, since it is beyond question that the bonds in this case were not required by the court nor given by the plaintiffs pursuant to the provisions of the Norris-LaGuardia Act. The rule that the language of a statute requiring a bond in a certain form must be read into any bond made pursuant to the statute is frequently applied in cases where the principal on the bond applies for and receives the contract, privilege, or benefit authorized by the statute on the condition expressed in the statute that the principal execute a bond in the terms provided by the statute. In such cases the person from whom the bond is required is conclusively presumed to have intended to execute the bond in the amount and upon the conditions demanded by the statute, the benefit of which he accepts; the language of the statute is written into the bond, though omitted by inadvertence or intention. The cases relied on by defendants on this point are of this char-

acter. For example, see *United States* v. *Hartford Accident and Indemnity Co.*, 2 Cir., 117 F. 2d 503; *Heiser* v. *Woodruff*, 10 Cir., 128 F. 2d 178. The rule can not be applied in the present case. The issue before the courts on both the temporary restraining order and the temporary injunction was whether the Norris-LaGuardia Act controlled or the Sherman Act, as amended by the Clayton Act. If the Norris-LaGuardia Act controlled, the courts were required to demand of the plaintiffs bonds conditioned to pay the reasonable expenses and attorneys' fees of defendants, incurred in resisting the order granted or any other order of injunction granted and subsequently denied by the court. If the Clayton Act controlled, the courts were required to exact from plaintiffs bonds conditioned to pay only such costs and damages as the defendants sustained by reason of the wrongful issuance of the restraining order or temporary injunction. 38 Stat. 738, 28 U. S. C. A., Sec. 382. Necessarily, when the courts decided that their jurisdiction on the question before them was limited only by Section 20 of the Clayton Act, they also decided that the bonds required of the plaintiffs should be conditioned in accordance with the provisions of that Act. Accordingly, in each instance the courts ordered bonds conditioned exactly as Section 18 of the Clayton Act required. The bond for $25,000 given on the appeal from the decree of the district court dismissing the action was required by the court under Equity Rule 74, and not pursuant to the Norris-LaGuardia Act. The fact that the decrees under which the bonds were given were erroneous does not entitle the defendants to recover the expenses and attorneys' fees incurred by them in resisting the decrees, nor in securing their reversal and the ultimate vacation of the orders issued in conformity with the decrees. The loss, if any, caused defendants by the errors of the court is *damnum absque injuria*, one of the unavoidable incidents of litigation to which parties are exposed. *United Motor Service, Inc.*, v. *Tropic-Aire, Inc.*, 8 Cir., 57 F. 2d 479, at p. 483.

"It follows from the authorities cited that the district court was correct in holding that the defendants could not recover on any bond an amount in excess of the penalty of the bond nor for any liability except that stipulated in the bond. See and compare *Tenth Ward Road District* v. *Texas and Pacific R. Co.*, 5 Cir., 12 F. 2d 245, 45 A. L. R. 1513; *Minneapolis, St. Paul, and S. S. M. R. Co.* v. *Washburn Lignite Coal Co.*, 254 U. S. 370, 41 S. Ct. 140, 65 L. Ed. 310; *United Motor Service, Inc.*, v. *Tropic-Aire, Inc., supra.*"

This ruling does not conflict with any decision cited by defendants (pp. 15-17) except the unreported decision of a district judge in *McNamara* v. *Calvin.** This memorandum opinion cites no authority, and manifestly conflicts with decisions of this Court uniformly holding that liability in a case like this must be determined and measured by the terms of the bond actually filed. *Houghton* v. *Meyer*, 208 U. S. 149, 157; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228, 233; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Washburn Lignite Coal Co.*, 254 U. S. 370, 374; *Meyers* v. *Block*, 120 U. S. 206, 211; *Russell* v. *Farley*, 105 U. S. 433, 437; *Bein* v. *Heath*, 12 How. 168, 179. In *Houghton* v. *Meyer, supra*, this Court said:

"But we do not think the case can be decided upon conjecture as to what bonds *might have been* required. We must determine the case upon the liability of the principals and sureties on the bond *which was actually given.*" (Italics supplied.)

In *Lawrence* v. *St. Louis-San Francisco Ry. Co., supra*, this Court said:

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*The opinion in **McNamara v. Calvin** may be found only in the appendix to defendants' brief, where it is preceded by a purported statement of the facts, taken, not from the opinion, but from an article appearing in a law review.

> "If it had not, when entering the interlocutory decree, required that bond be given, *no damages could have been recovered* on the dissolution of the injunction." (Italics supplied.)

In *Meyers* v. *Block*, *supra*, this Court said:

> "* * * Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. *It is only by reason of the bond, and upon the bond, that he can recover anything.*" (Italics supplied.)

Defendants argue that the requirement of a bond in Section 7 of the Norris-LaGuardia Act is mandatory. So also is the similar requirement of Section 18 of the Clayton Act; yet after the enactment of the Clayton Act Justice Brandeis for the unanimous Court continued to hold that liability is dependent upon the bond actually filed. *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, *supra*. To the same effect are other cases decided since the Clayton Act. *Berger Mfg. Co.* v. *Huggins*, 242 Fed. 853, 857 (C. C. A. 8); *United Motors Service, Inc.*, v. *Tropic-Aire, Inc.*, 57 F. 2d 479, 482 (C. C. A. 8); *Tenth Ward Road District* v. *Texas & Pacific Ry. Co.*, 12 F. 2d 245, 247 (C. C. A. 5), and *Becker* v. *Stander*, 17 F. 2d 772, 773.

Other decisions with which defendants (at pp. 15-16) claim that the decision below conflicts are those dealing with *non-judicial* statutory bonds, such as a bond securing performance of a public building contract, *Hill* v. *American Surety Co.*, 200 U. S. 197; bond required from a war veteran seeking a duplicate adjusted service certificate in place of a lost certificate, *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. 2d 503 (C. C. A. 2); and bond given to secure extension of time for payment of income tax, *United States* v. *Hamilton*, 96

F. 2d 878, 880 (C. C. A. 7). These cases are distinguishable because (a) not one was an injunction case dealing with an injunction bond with terms and penalty fixed by a court; (b) in each case the bond was avowedly and designedly furnished in purported compliance with the statute involved in the particular case, and (c) in each case the statute was self-executing and bound the bond-giver, directly, to give a bond in certain specified terms.

For similar reasons the decisions of state courts cited by defendants (at p. 16) are distinguishable. Conflict with state court decisions, even if present, would of course be wholly irrelevant on petition for certiorari.

Heiser v. *Woodruff*, 128 F. 2d 178 (C. C. A. 10), instead of supporting defendants' position is squarely opposed to it. The court there held that attorney's fees were not recoverable under the injunction bond given.

The case of *Hays* v. *Fidelity & Deposit Co.*, 112 Fed. 872 (C. C. A. 5), did no more than apply the state rule of Louisiana, which was that the obligor's liability depends on the law and not on the form of the bond. Be that as it may, the federal rule is that the terms of the bond are controlling.

It is apparent that the decision below does not conflict with any of the foregoing cases, save and except only *McNamara* v. *Calvin* (unreported).

Other decisions cited by defendants (at p. 17) merely hold that laws regulating the validity, performance and enforcement of a contract enter into and form a part of it. The decision below certainly does not conflict with that settled principle.

Defendants say (p. 17) that "statutes do not, ordinarily at least, apply only if someone purports to obey them." That is true. But it is also true that when a

court is called upon to decide whether an injunction bond shall be conditioned according to one or the other of two statutes, and makes the decision, and specifies the terms of the bond to be given (as here), the applicant for injunctive relief has no alternative but to give bond in the form specified. This is elementary. *Jones* v. *Gray*, 91 Ill. App. 79, 81.

Defendants say (p. 17) that by "inducing error" in the applicability of the Norris-LaGuardia Act plaintiffs and intervener escaped "the liability Congress intended to impose upon them by Section 7." The short answer is that plaintiffs and intervener induced no error; they submitted to the terms laid down by the District Court and gave bonds precisely embracing those terms.

Defendants in effect argue that the courts below should have reformed the bonds to embrace terms never fixed by the District Court and never agreed to by plaintiffs, intervener or the surety. Defendants in effect argue for a retroactive determination of liability, *ex post facto*, upon contractual terms never consented to by the obligors—terms never even presented to the obligors for acceptance or rejection. But it was too late for reformation of the bonds. If defendants were not satisfied with the terms of the bonds when specified or given, defendants had an ample remedy—first, by motion to require a different form of bond (*Goldmark* v. *Kreling*, 25 Fed. 349; *Standard Bonded Warehouse Co.* v. *Cooper*, 30 F. 2d 842, 845; 32 C. J. 317); and, if that motion failed, then, second, by petition to the Circuit Court of Appeals for mandamus (38 C. J. 643). Defendants pursued neither remedy and clearly waived any objection to the form of the bonds. *Jones* v. *Gray*, 91 Ill. App. 79, 81; *Hathorn* v. *Natural Carbonic Gas Co.*, 137 App. Div. 551,

121 N. Y. Supp. 683, 686; *Young Chun* v. *Robinson*, 21 Hawaii 193, 196.

To summarize: The court below in substance ruled that when the obligors in good faith executed bonds in terms fixed by the District Court under the Clayton Act and Equity Rule 74, the obligors were justified in assuming that the terms would remain constant, that the extent of the risk they had assumed was settled and would not later be expanded to include a liability predicated on another statute—certainly not without a motion for such a change of liability followed by a hearing and ruling of the court thereon. This ruling not only was sound law but was good morals as well. Certainly, it does not conflict with any decision of this Court or of another Circuit Court of Appeals. It is respectfully submitted that defendants' Point I is without merit.

II.

The court below correctly refused to allow defendants to recover under Section 7, regardless of the bonds.

Defendants' position is that although the District Court's orders specifically prescribed the terms of each bond, and although plaintiffs and intervener in giving the bonds meticulously complied with these orders of the court, the bonds thus given are now to be treated as so much waste paper and recovery is to be determined regardless of their terms. Defendants thus seek not merely to "change the rules in the *middle* of the game," but to change the rules *after the game has ended.* This shocking contention is completely answered by the opinion of the Circuit Court of Appeals, which said (R. 586-7):

> "All of defendants' contentions concerning the construction and controlling effect of Section 7 of

the Norris-LaGuardia Act must be rejected. There is no ambiguity in the section and no room for construction. *United States* v. *Missouri-Pacific R. Co.*, 278 U. S. 269, 277, 49 S. Ct. 133, 136, 73 L. Ed. 322. 'An undertaking with adequate security' is, in common usage and in the language of the law, a bond. Webster's International Dictionary, 'Undertaking.' The requirement of a bond as a condition precedent to an order for temporary injunctive relief is directly opposed to the notion that the Act is self-executing and that the liability of a plaintiff to a defendant on an erroneous order of restraint is measured by the defendant's expenditures in vacating the order, without regard to the amount stipulated in the bond and fixed by the court in conformity with the Act. We may not suppose that Congress, in imposing upon the court the duty of determining the amount of security adequate to the protection of a defendant, and just to a plaintiff, intended that the court's determination should be wholly ineffectual and without meaning as the measure of plaintiff's liability upon his undertaking. We think the statutory requirement of a bond, upon certain conditions, in an amount to be fixed by the court is conclusive evidence of the legislative intention that the bond should be the evidence and the measure of plaintiff's liability and defendant's protection. In this there is nothing inconsistent with an intention on the part of Congress to provide for labor unions and their members the widest possible protection against erroneous and improvident injunctions. Necessarily, at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate. It may be fixed in a sum which the event proves inadequate or excessive. If the security required by the court becomes inadequate while the restraint continues and the litigation proceeds, a defendant has ready to hand the means for his protection by a motion for an increase in the amount of the security. If we concede that the rights of the parties in the present

action are controlled by Section 7 of the Norris-La-Guardia Act, defendants are nevertheless not entitled to recover in excess of the total of the penalties of the bonds required by the court, since at no time in the present litigation did they complain either of the conditions of the bonds or of the amount of the security determined to be adequate by the courts which required them. The weight of authority in the Federal courts is that a recovery in excess of the maximum amount stipulated in a judicial bond is not permissible. *United Motor Service, Inc.*, v. *Tropic-Aire, Inc.*, 8 Cir., 57 F. 2d 479, 482, reviewing the prior decisions of this court and other Federal courts. And see *Russell* v. *Farley*, 105 U. S. 433, 437, 26 L. Ed. 1060; *Meyer* v. *Block*, 120 U. S. 206, 211, 7 S. Ct. 525, 30 L. Ed. 642; *Lawrence* v. *St. Louis-San Francisco R. Co.*, 278 U. S. 228, 233, 49 S. Ct. 106, 73 L. Ed. 282."

Defendants do not challenge this obviously sound ruling as in conflict with any decision of this Court or of another Circuit Court of Appeals. They claim that there is conflict with two District Court decisions. This would be irrelevant if true. But there is no real conflict. While in *Cinderella Theatre Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 830, 831, the Court said that Section 7 means that "the defendants are entitled to recover all damages and all reasonable expense caused them by this suit," that language must be construed in light of the facts there held in judgment—which were that the damages proved and allowed were plainly within the terms and penalty of the bond given. In *Houston & North Texas M. F. Lines* v. *Local No. 745*, 27 F. Supp. 262, 264, the point actually decided was that the defendants in that case were not entitled to any damages. The judge's suggestion that "the statute could hardly mean that expenses were to be allowed only if bond were given," was therefore pure *obiter dictum*, as defendants

concede (p. 21); the statement is unsupported by the citation of any authority, and unquestionably is inconsistent with the rule laid down by this Court in decisions cited (pp. 15-16, *supra*).

Defendants attack the decision below as involving a construction of Section 7 "of doubtful validity." Defendants' own construction is worse than doubtful; it is clearly erroneous. Plainly, Section 7 itself is not self-executing; the section itself imposes no liability upon a plaintiff seeking injunctive relief. It is merely a mandate addressed to the court, to require a bond with certain terms in an injunction suit involving a labor dispute. Liability of plaintiff depends upon the court requiring bond and plaintiff giving it. There would be no object in the court's fixing terms and amount of the bond if in the assessment of damages it is to be wholly ignored, as defendants argue it should be.

Defendants' argument that the "undertaking" is one contract and the "security" another contract is a mere play upon words. The words "undertaking with adequate security in an amount to be fixed by the court" plainly mean a bond with adequate surety in an amount to be fixed by the court. "Undertaking" in Section 7 is commonly referred to as meaning "bond." *Cinderella Theatre Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 830, 831; *Local Union 368* v. *Barker Painting Co.*, 24 F. 2d 879, 880; *Houston & North Texas Motor Freight Lines* v. *Local 745*, 27 F. Supp. 262; *Tri-Plex Shoe Co.* v. *Cantor*, 25 F. Supp. 996. The word "security" no doubt often means "bond," but it also means the "surety" who signs the bond. Compare *Heiser* v. *Woodruff*, 128 F. 2d 178, 179 (C. C. A. 10). For example, Sec. 18, R. S. Mo., 1939, provides that "the court * * * shall take a bond * * * with two or more sufficient securities * * *." Sec. 22, R. S. Mo., 1939, likewise says that the court shall take special care

"to take as securities men who are solvent * * *," and that if "any security has become a non-resident," the court shall require another bond. Similar uses of the word could be multiplied indefinitely.

To adopt defendants' construction of "undertaking" and "security" as meaning two different contracts would lead to this absurdity, among others: The surety, who Section 7 says must sign the "undertaking," would be liable thereon in an *unknown* and *unlimited* amount, *to be determined at the end of the litigation;* yet at the same time he would also be liable on the "security" in the *definite* amount fixed by the court. A construction leading to so fantastic a result simply cannot be sound.

Defendants say (p. 19) that the legislative intent was to afford defendants in a labor dispute full protection against abuse of federal injunctive process. No doubt that is true. But it is also true that the legislative intent in requiring bond in every injunction suit is to protect defendants generally against the same abuse. Nevertheless, the rule still stands, that the terms of the bond actually filed are controlling.

There is nothing in the legislative history of the Norris-LaGuardia Act suggesting any legislative intent to depart from this settled rule. In House Report No. 669 on H. R. 5315 (First Session, 72nd Congress) the House Committee on the Judiciary dealt in detail and at length with all of the innovations in the Act, but as to the bond provision of Section 7 the Committee made only this perfunctory comment:

> "The other provisions of this section hardly require any particular discussion, because they relate to the giving of notice, the length of time that a temporary restraining order shall be effective, the necessity for giving *an undertaking with surety*, the recompense for damages caused by the erroneous is-

suance of injunctions, and the like; all of which are generally considered necessary and reasonable when the extraordinary injunctive arm of the court is brought into play with the serious consequences of injury which the improvident issuance of an injunction frequently produces." (Italics supplied.)

In the face of this reference to the giving of "an undertaking with surety," what becomes of defendants' fantastic suggestion that *two contracts* are required? This casual reference to the bond provision suggests that the House Committee certainly did not regard it as injecting anything inconsistent with the usual provisions of an injunction bond or with the settled principle that the terms of the bond are controlling.

Defendants' argument (p. 20) that House Bill 5315 originally omitted the words "in an amount to be fixed by the court," and that they were substantially inserted, instead of supporting defendants' contention opposes it, for it shows that Congress decided that the plaintiff's obligation (his undertaking to be filed) should be for a fixed penal amount and that the court should determine what that amount should be.

Defendants (p. 20) refer to contemporaneous state statutes according to a defendant full recovery of damages sustained, regardless of any bond. Significantly, in enacting the Norris-LaGuardia Act Congress *did not so provide.*

Defendants (p. 20) argue that the opinion below "emasculates Section 7." That is an inaccurate statement. The opinion, on solid grounds, merely holds Section 7 inapplicable.

It is respectfully submitted that defendants' Point II is without merit.

III.

Petitioners present no question of importance justifying certiorari.

This Court has definitely settled the question of what constitutes a "labor dispute" within the meaning of the Norris-LaGuardia Act. *Lauf* v. *Shinner & Co.*, 303 U. S. 323; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91; *Columbia River Packers' Association* v. *Hinton*, 315 U. S. 143; *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50. Inferior federal courts have consistently followed these decisions. No longer is the question of what constitutes a "labor dispute" an open or debatable one.

As to the form of bond required, no court has ever questioned the proposition that in a suit involving a labor dispute a federal court upon the issuance of a restraining order or temporary injunction must require a bond conditioned according to Section 7 of the Norris-LaGuardia Act. No court has ever held otherwise and there is no likelihood that any court ever would hold otherwise.

It results that the questions presented in the case at bar (which originated before the decision in the Lauf Case) in all reasonable probability will never arise hereafter. So there is presented here no "special and important reason" for review by certiorari. Rule 38.

Defendants say (p. 22 of their brief) that "the trend of judicial construction" of Section 7 has been "abruptly

reversed" for the reason that "there are District Court decisions squarely opposed to the result now reached." It is submitted that the unreported decision in *McNamara* v. *Calvin* and the dictum in *Houston & North Texas Motor Freight Lines* v. *Local 745*, 27 F. Supp. 262, 264, can hardly be said to have established a "trend." Moreover, conflict with these district court cases is not important, in view of the undeniable fact that the decision below is in harmony with the unbroken line of decisions by this Court and Circuit Courts of Appeals (cited pp. 15-16, *supra*), which hold that in a case like this the injunction bond actually filed is the measure of a plaintiff's liability.

The result reached below was correct. It is well settled that attorneys' fees and expenses of litigation are not recoverable in federal courts under an injunction bond conditioned (as were the $2,000 and $10,000 bonds) for payment of costs and damages. *Tullock* v. *Mulvane*, 184 U. S. 497, 511; *Missouri, Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 530, 539-40; *Oelrichs* v. *Spain*, 15 Wall. 211, 230-1; *Bein* v. *Heath*, 12 How. 168, 178-9. On the theory of the recovery allowed on the $25,000 bond, "defendants do not claim that the amount allowed is inadequate" (R. 593). A further reason showing that the result reached below was correct is given in the opinion below (R. 592), and is not attacked by defendants, namely, the lack of required segregation or allocation of the claimed fees and expenses as between the various phases of the litigation.

It is respectfully submitted that the questions here presented do not justify certiorari.

CONCLUSION.

The petition for certiorari should be denied because the case was correctly decided below and petitioners present neither a conflict of decisions nor a question of general importance.

Respectfully submitted,

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